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In the Supreme Court of the United States

OCTOBER TERM, 1974

CITY OF RICHMOND, VIRGINIA, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL PARTIES

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. B) is reported at 376 F. Supp. 1344.

JURISDICTION

The judgment of the district court (J.S. App. A) was entered on June 6, 1974. Notice of appeal (J.S. App. E) was filed in that court on July 15, 1974. The jurisdictional statement was filed on August 29,

1974. This Court noted probable jurisdiction on December 16, 1974. The jurisdiction of this Court rests upon 42 U.S.C. 1973c.

QUESTION PRESENTED

Whether the changes in voting practices resulting from a city's annexation of a predominantly white suburb and subsequent adoption of a plan for single-member district councilmanic elections abridge the right to vote on account of race or color, where the original purpose of the annexation had been to maintain a white voting majority in the city's at-large councilmanic elections but (a) the annexation in fact will serve legitimate, nondiscriminatory purposes and (b) the effect of the later adoption of the single-member district plan will be to afford black voters fair representation on the city council.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, is set forth at J.S. App. D.

STATEMENT

This action for declaratory judgment was brought by appellant, City of Richmond, Virginia, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to determine whether the voting changes caused by the City's 1969 annexation of approximately 23 square miles of neighboring Chesterfield County had the purpose or effect of abridging

the right to vote on the basis of race. The effect of the annexation had been to add 45,705 white residents and 1,557 black residents to the City's population and to change the racial composition of the City from 52 percent black to 58 percent white (J.S. App. B, p. 14b).

1. The annexation was the culmination of separate annexation proceedings instituted by the City in 1961 and 1962 against Henrico and Chesterfield Counties.[1] In 1965, the annexation court awarded the City approximately 16 square miles of Henrico County, with a nearly all-white population of 45,000, in return for the City's assumption of liabilities in the amount of approximately 55 million dollars. The City determined to reject the award and to pursue the Chesterfield County annexation suit, which had been held in abeyance pending resolution of the Henrico County suit.

The City initiated attempts to settle the Chesterfield County annexation suit after its 1968 at-large councilmanic elections. In those elections, three candidates endorsed by appellee Crusade for Voters of Richmond, a black civic organization, were elected to the nine-member city council (J.S. App. B, pp. 10b-11b). This fact, coupled with voting and population projections suggesting that candidates endorsed by

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[1] The facts relating to the annexation suits are set forth in *Holt* v. *City of Richmond*, 334 F. Supp. 228 (E.D. Va.), reversed, 459 F. 2d 1093 (C.A. 4), certiorari denied, 408 U.S. 931. The parties to this case have stipulated to the record in *Holt* v. *City of Richmond, supra*. See J.S. App. C, p. 2c.

Crusade for Voters might be elected to a majority of the city council seats in the near future, convinced the City's "white political leadership * * * that annexation of part of Chesterfield County was necessary to keep the black population from gaining control of the city in the 1970 elections" (J.S. App. B, p. 11b). The City's settlement negotiations with Chesterfield County reflected this concern (J.S. App. B, p. 13b; footnotes omitted):

> [The City's] focus in the negotiations was upon the number of new white voters it could obtain by annexation; it expressed no interest in economic or geographic considerations such as tax revenues, vacant land, utilities, or schools. The mayor required assurances from Chesterfield County officials that at least 44,000 additional white citizens would be obtained by the City before he would agree upon settlement of the annexation suit. And the mayor and one of the city councilmen conditioned final acceptance of the settlement agreement on the annexation going into effect in sufficient time to make citizens in the annexed area eligible to vote in the City Council elections of 1970.

Only six members of the city council were kept informed by the mayor of the settlement negotiations; the three members who had been endorsed by the Crusade for Voters were not informed of those negotiations, and they learned of the settlement only when it was publicly announced (J.S. App. C, p. 3c).

The City entered into the settlement agreement with Chesterfield County in June 1969, and the

terms of the agreement were adopted essentially verbatim by the annexation court (App. 40-48). The annexation became effective January 1, 1970, and at-large councilmanic elections were held within the City, as expanded by the annexation, in June 1970 (J.S. App. B, p. 14b). As in 1968, of the nine councilmen elected, only three had received the endorsement of Crusade for Voters (*ibid.*).

2. In the following year, Curtis Holt, Sr., a black resident of the City, filed suit against the City in the United States District Court for the Eastern District of Virginia, alleging that the purpose and effect of the annexation was to dilute the voting rights of black citizens, in violation of the Fifteenth Amendment, and requesting de-annexation. The district court determined that the annexation had been motivated by the impermissible purpose of diluting black voting rights. The court concluded, however, that the appropriate remedy was not de-annexation but new councilmanic elections, in which seven councilmen would be elected at large from an area approximately within the City's old boundaries and two from approximately the newly annexed area. *Holt* v. *City of Richmond*, 334 F. Supp. 228 (E.D. Va.). Both Holt and the City appealed. The court of appeals, sitting *en banc*, reversed the finding of a violation of the Fifteenth Amendment (459 F. 2d 1093, 1099):

> For perfectly valid reasons, Richmond's elected representatives had sought annexation since 1961. Those reasons were compelling, so much

> so that, as the District Court found, annexation was "inevitable." * * * If some impermissible reasons crept into the minds of some members of Richmond's Council in 1969, that cannot negate all of the compelling reasons which led them and their predecessors in office to press on the same course in earlier years.

This Court denied certiorari. 408 U.S. 931.

In the meantime, Holt had filed another suit in the same district court, seeking a judgment that the annexation was without legal effect because the City had failed to obtain prior approval as required by Section 5 of the Voting Rights Act of 1965 and requesting that the City's 1972 councilmanic elections be enjoined. *Holt* v. *City of Richmond*, C.A. 695-71-R (E.D. Va.). The injunction was denied by the district court but granted by this Court. 406 U.S. 903.[2]

Contemporaneously with that litigation, the City submitted its annexation plan to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 (App. 20-22). By letter dated May 7, 1971, the Attorney General objected as follows to the voting changes resulting from the annexation (App. 23-24):

> Municipal annexations are, of course, commonly undertaken for a variety of reasons and

[2] The district court subsequently enjoined further elections pending the outcome of the instant litigation. *Holt* v. *City of Richmond*, C.A. 695-71-R (E.D. Va.), Orders of October 12, 1972 and October 9, 1974.

> affect a number of areas of concern to local governments. Section 5 is not addressed to annexations per se; but the Attorney General is obliged under section 5 to be concerned with the voting changes produced by an annexation. In the present instance, the city of Richmond elects representatives to its governing body on an at-large basis; its population is approximately evenly divided between whites and blacks. The submitted change would increase the city's population by approximately 43,000 new residents of whom a very small minority is Negro. In the circumstances of Richmond, where representatives are elected at large, substantially increasing the number of eligible white voters inevitably tends to dilute the voting strength of black voters. Accordingly, the Attorney General must interpose an objection to the voting change which results from the annexation.
>
> You may, of course, wish to consider means of accomplishing annexation which would avoid producing an impermissible adverse racial impact on voting, including such techniques as single-member districts.

3. Following receipt of the Attorney General's letter, the City filed this action in the United States District Court for the District of Columbia, requesting a declaratory judgment that the voting changes incident to its annexation were not adopted for the purpose and did not have the effect of abridging the right to vote on account of race or color (App. 14). A three-judge court was designated to hear the case. Appellees Curtis Holt, Sr., and Crusade for Voters

of Richmond were granted leave to intervene as defendants.

Following the decision in *City of Petersburg, Va.* v. *United States*, 354 F. Supp. 1021 (D. D.C.), affirmed, 410 U.S. 962, holding that the adoption of a single-member district voting plan that ensured black voters fair representation on a city council would remove the discriminatory taint of an otherwise impermissible annexation, the City submitted to the Attorney General and the other parties in this case four alternative plans for establishing single-member district councilmanic elections. The Attorney General concluded that one of the plans would, with some modification, ameliorate the dilutive effects of the annexation sufficiently to satisfy the requirements of Section 5. The City adopted that plan, with the modifications suggested by the Attorney General, in May 1973. The plan as modified provides for the election of one councilman from each of nine wards; four of the wards would have substantial white majorities, four would have substantial black majorities, and the ninth would be approximately 59 percent white and 41 percent black (J.S. App. B, p. 23b).

The City, together with the federal parties, then submitted to the district court a proposed consent judgment that declared that the annexation, as modified by the single-member district voting plan adopted by the City, did not have the purpose or effect of denying or abridging the right to vote on account of race or color (App. 150-153). The intervenors opposed the proposed consent judgment, and the district

court referred the case to a special master for a hearing on the merits. The special master concluded that the annexation was motivated by "an impermissible racial purpose" (J.S. App. C, p. 14c) and that "de-annexation is the only method by which the instant impermissible racial purpose may be cured" (*ibid.*).

The district court, after reviewing the special master's findings and conclusions, denied the City's request for a declaratory judgment. The court stated that since the annexation itself had been motivated by an impermissible purpose, the City was required to prove "that it no longer had * * * a discriminatory purpose in retaining the annexed area after adoption of [the] single-member district ward plan" (J.S. App. B, p. 19b). The court reasoned that to carry that burden the City would have to demonstrate "by substantial evidence (1) that the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation, and (2) that the city has some objectively verifiable, legitimate purpose for annexation" (J.S. App. B, p. 20b; footnote omitted). The court determined that the City had failed to make either requisite showing. The particular single-member district plan adopted would not, in the court's view, sufficiently eliminate the dilutive effect of the annexation, because whites were virtually assured a five-to-four majority on the city council under that plan, whereas blacks arguably would have had some chance of electing a majority of council members in an at-

large election within the pre-annexation boundaries (J.S. App. B, pp. 23b-27b). The court further sustained the special master's determination that there was no legitimate purpose for retaining the annexed area, on the ground that there was evidence tending to show that the costs of administering the annexed area would exceed the revenues derivable from it (J.S. App. B, pp. 20b-22b).

The court further determined that "[i]n addition to a discriminatory purpose, the annexation also had a discriminatory effect under the *Petersburg* standard since the ward plan was not 'calculated to neutralize to the extent possible any adverse effect upon the participation of black voters'" (J.S. App. B, pp. 27b-28b).[3]

SUMMARY OF ARGUMENT

This case arises under Section 5 of the Voting Rights Act of 1965, which requires that the City establish that its proposed change in voting practice does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The change in voting practice at issue here results jointly from the City's annexation

[3] The district court further stated (with Judge Jones dissenting) that it had jurisdiction to order de-annexation (J.S. App. B, pp. 32b-35b). The court nevertheless refrained from doing so, in part because the question of de-annexation is presented in *Holt* v. *City of Richmond*, C.A. 695-71-R (E.D. Va.). Since the court did not exercise its claimed jurisdiction, we do not here discuss the question whether de-annexation would have been a permissible form of relief.

of a predominantly white suburb and its adoption of a plan for single-member district voting to replace its former at-large voting scheme.

I

The change in voting practice resulting jointly from the annexation and adoption of the single-member district voting plan will not have the effect of denying or abridging the right to vote on account of race.

In enacting the Voting Rights Act, Congress did not intend to bar all annexations that alter the racial composition of the annexing city. Accordingly, the fact that an annexation to some extent dilutes the effective voting power of one of the racial groups within the pre-annexation boundaries cannot be dispositive of the question whether the annexation has the effect of denying or abridging the right to vote within the meaning of the Act. Although the City's annexation does alter the racial composition of the City, ~~and~~ effect of the change in voting practice is permissible under the Act because (A) the voting change grants black voters the opportunity for meaningful participation in the electoral process and ensures their fair representation in the city government and (B) it does not impair the effective voting strength of the City's black residents.

A. The ward plan adopted by the City was designed to enhance black voting rights and thereby ameliorate the dilutive effect of the annexation. Four

of the nine wards established by the plan have substantial black majorities, and the black voters in those wards presumably will be able to select representatives responsive to their particular needs and concerns. A fifth "swing" ward reflects almost precisely the racial composition of the post-annexation City as a whole. The City's ward plan ensures, as an at-large plan could not, that black voters will be fairly represented on the city council.

B. Since blacks comprised only 44.8 percent of the City's pre-annexation voting-age population, under the City's previous at-large election plan strict racial bloc-voting would have resulted in the election of an all-white slate to the city council. In contrast, as a result of the voting change here at issue, black voters are effectively guaranteed the election of at least four members out of nine. This immediate enhancement of black voting strength balances, in our view, any postponement that the annexation may cause in the emergence of an effective black voting majority in city elections. Thus we believe that the City's change in voting practice has caused no significant dilution in black voting rights.

II

The change in voting practice does not have the purpose of denying or abridging the right to vote on account of race.

A. The City's immediate purpose in concluding the annexation agreement was impermissible under the Voting Rights Act. The crux of this case con-

cerns the additional showing that the City must make in order to establish that it no longer has a discriminatory purpose in retaining the annexed area. The district court apparently would require the City to show that the *effect* of its change in voting practice will be affirmatively and disproportionately favorable to blacks in order to establish that the *purpose* of this change was not discriminatory against blacks. That, we submit, was improper. In our view, in a case such as this a proper application of the "purpose" test under the Act would proceed as follows: (1) a state or political subdivision subject to the Act may carry its initial burden of coming forward with evidence of permissible purpose either by direct evidence of such a purpose or, in some instances, by establishing that its change in voting practice will have a permissible effect; (2) the burden is then shifted to the Attorney General or other party opposing the voting change to come forward with affirmative evidence of an impermissible purpose; (3) once such evidence is offered, the state or political subdivision then bears the burden of proving that it in fact has an objectively verifiable, legitimate purpose for the change.

B. The City has objectively verifiable, legitimate reasons for retaining the annexed area. Although the timing of the conclusion of the annexation agreement apparently was motivated by impermissible racial considerations, the annexation itself was principally motivated by legitimate goals of urban expansion, in particular by a need to broaden the City's

tax base in view of the high public welfare expenditures required by the growing low-income population within the pre-annexation boundaries. The costs of administering the newly annexed area will be significantly less than the revenues that area will produce. Furthermore, the annexation has enabled the City to maintain racially integrated schools.

However, because the parties at trial did not directly litigate the question whether the City has sound reasons for retaining the annexed area, the City did not develop and present all its evidence relating to that question and the intervening defendants have not had a full opportunity to rebut such evidence. In the circumstances, we believe that it would be appropriate to vacate the judgment below and remand for further consideration of that question.

ARGUMENT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides that a state or political subdivision subject to the prohibitions of the Act may not enforce any change in voting qualification, prerequisite, standard, practice, or procedure unless and until either the proposed change has been submitted to the Attorney General and sixty days pass without his interposing an objection or the United States District Court for the District of Columbia enters a judgment that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or

color. The City, as a political subdivision of the State of Virginia, is subject to the prohibitions of the Voting Rights Act. 30 Fed. Reg. 9897.

The extension of a city's political boundary by an annexation "which enlarge[s] the city's number of eligible voters * * * constitutes the change of a 'standard, practice, or procedure with respect to voting' [within the meaning of Section 5 of the Act]." *Perkins* v. *Matthews*, 400 U.S. 379, 388. As the Court explained in *Perkins* (400 U.S. at 388-389):

> * * * [R]evision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation.

It is therefore clear that the City may not enforce the change in voting practice resulting from its 1969 annexation, *i.e.*, may not extend the franchise to persons residing within the newly annexed area, until it has complied with the requirements of Section 5.

Prior to its modification by the single-member district voting plan, the City's annexation did not meet the standards imposed by Section 5. The opinion of the district court convincingly demonstrates (J.S. App. B, pp. 10b-14b) that the City's immediate purpose in concluding the annexation agreement was to gain additional white residents in order to maintain a white voting majority in the City's at-large councilmanic elections, *i.e.*, that the immediate purpose of the annexation was the impermissible one of abridging, through substantial dilution, the voting rights of the City's black residents.[4] It is therefore

[4] That finding is amply supported by the evidence recited by the district court and the special master (J.S. App. C, pp. 2c-6c) and is not clearly erroneous. Furthermore, the City errs in contending (Br. 22-23) that under the doctrines of *res judicata* and collateral estoppel that finding was barred by the decision in *Holt* v. *City of Richmond*, 459 F. 2d 1093 (C.A. 4), certiorari denied, 408 U.S. 931, that the annexation did not contravene the Fifteenth Amendment. The court in that case expressly noted that the causes of action arising under the Fifteenth Amendment and the Voting Rights Act were separate and distinct and that it had "no jurisdiction to consider any problem arising under that Act, and what we have said reflects no opinion as to the appropriateness * * * of the Attorney General's objection [to the annexation]." 459 F. 2d at 1100. Moreover, in *Holt* the burden was on the plaintiff to establish that the annexation was motivated by an impermissible purpose, whereas here the burden is on the City to show the absence of any such purpose. See *Georgia* v. *United States*, 411 U.S. 526, 538. This difference in the incidence of the burden of proof "precludes application of the doctrine of collateral estoppel." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235. In any event, none of the federal parties here participated in the earlier *Holt* litigation and they therefore are not barred by *res judicata* or collaterally estopped by any findings in that case. "[L]itigants * * * who never appeared in a prior action * * * may not be collaterally estopped without litigating the issue." *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 329.

clear that the City was not entitled to a judgment declaring that the change in voting practice resulting from the annexation *per se* did not have the purpose of denying or abridging the right to vote on account of race.

That, however, was not the issue that the district court was ultimately called upon to decide. After instituting this action, the City, as a result of consultation with the Attorney General, discarded its at-large councilmanic election scheme in favor of single-member district voting, and it amended its complaint in this case to request a declaratory judgment that neither the purpose nor the effect of the change in voting practice resulting jointly from the annexation and the adoption of the single-member district voting plan was to deny or abridge the right to vote on account of race. For the reasons we discuss below, the district court erred in denying that request.

I

THE CHANGE IN VOTING PRACTICE RESULTING JOINTLY FROM THE CITY'S ANNEXATION AND SINGLE-MEMBER DISTRICT VOTING PLAN WILL NOT HAVE THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE

We begin with the proposition that, in enacting the Voting Rights Act of 1965, Congress did not intend to bar all annexations that alter the racial composi-

tion of the annexing city.[5] Typically, the racial composition of a city differs from that of the adjacent suburbs or rural areas, and almost any annexation will have the effect of changing the city's racial composition. A change in racial composition presumably will affect existing political relationships, especially in communities, such as those with which the Voting Rights Act is concerned, where bloc-voting by race is or may be common. Yet nothing in the Act or its legislative history suggests a congressional intent to enwrap the affected cities in the straitjacket of their existing political boundaries.

Thus we believe that the fact that an annexation alters the racial composition in the annexing city, and thereby to some extent dilutes the political power of one of the racial groups within the pre-annexation boundaries, is not dispositive of the question whether the annexation has the effect of denying or abridging the right to vote on account of race. We agree in this respect with the district court in *City of Petersburg, Va.* v. *United States*, *supra*, which stated (354 F. Supp. at 1030; footnote omitted):

> If [a contrary] view of * * * what constitutes a denial or abridgment in annexation cases were to prevail, no court could ever approve any annexation in areas covered by the Voting Rights Act if there were a history of racial bloc-voting in local elections for any office and if the racial

[5] Between January 1971 and June 1974 the Attorney General reviewed 867 proposed annexations pursuant to Section 5 of the Act and objected to only six.

> balance were to shift in even the smallest degree as a result of the annexation. It would not matter that the annexation was essential for the continued economic health of a municipality or that it was favored by citizens of all races; because if the demographic makeup of the surrounding areas were such that any annexation would produce a shift of majority strength from one race to another, a court would be required to disapprove it without even considering any other evidence, and the municipality would be effectively locked into its original boundaries. This Court cannot agree that this was the intent of Congress when it enacted the Voting Rights Act.

In short, the dilution of a racial group's political power through annexation is not, *per se*, in all circumstances, the denial or abridgment of the right to vote on account of race.

The present case does not, in our view, require this Court to address the difficult problem of defining the circumstances under which the dilutive consequences of an annexation amount to the denial or abridgment of voting rights.[6] As we discuss further below (pp. 23-27, *infra*), the voting change here in question has not impaired the effective voting strength of the City's black residents, *i.e.*, the annexation, when considered together with the City's new

[6] That question might be presented where a city with a pre-existing ward voting plan annexes a tract of suburban land. We do not here reach the question of the applicability of the Act's "effect" test in such a situation.

single-member district voting plan, has not resulted in a significant dilution of black political power. But we first show (pp. 20-23, *infra*), that the City's new voting scheme grants black voters the opportunity for meaningful participation and fair representation in the city government. That, we believe, is a necessary prerequisite under the Act for the approval of any annexation.

A. The City's Single-Member District Voting Plan Grants Black Voters the Opportunity For Meaningful Participation In The Electoral Process And Ensures Their Fair Representation In The City Government

The single-member district voting plan adopted by the City divides the City into nine wards, each of which is entitled to elect one member to the nine-member city council.[7] It is undisputed that the wards were drawn in a racially neutral manner that precluded any invidious racial gerrymandering. The special master found (J.S. App. C, p. 9c):

> 19. The plans [that] Dallas H. Oslin [the City's senior planner] prepared were non-racially drawn. He used the guidelines or criteria of equal components (equality of population in each of nine wards), compactness of each ward, contiguity, likeness of area * * *, following geographical and physical boundaries, and maintaining the integrity of districts and communities of interest within each ward as much as possible.
>
> 20. While Oslin knew generally the black and white neighborhoods in the City, he did not draw his plans with racial divisions in mind. * * * Oslin did not use the census information on race until after the plans were initially drawn.

[7] The wards are roughly equal in population, varying from 26,442 (Ward B) to 29,099 (Ward H)—a maximum percentage variation of less than 10 percent (App. 162). See *Mahan* v. *Howell*, 410 U.S. 315, Gaffney v Cummings, 412 U.S. 735.

This is not, however, to say that the City, in formulating its voting plan, was insensitive either to the legitimate interests of its black citizens in securing fair representation or to the importance of minimizing any dilution of black voting strength resulting from the annexation. The City submitted four alternative plans to the Attorney General and consulted with the Department of Justice concerning those plans. The Department of Justice selected the plan it regarded as most favorable to black voters and suggested certain modifications that would further enhance black voting rights and thereby ameliorate the dilutive effect of the annexation. The City made the suggested modifications and adopted the plan as modified.

The voting plan adopted by the City grants black voters the opportunity for meaningful participation in the electoral process. Four of the nine wards established by the plan have substantial black majorities.[8] The black voters in those wards will presumably be able to select representatives responsive to

[8] The racial composition of each ward is set forth at App. 162.

their own needs and concerns. As the district court in *City of Petersburg, Va.* recognized (354 F. Supp. at 1027):

> * * * [T]he election from single-member districts of a number of governmental representatives to a body composed of several members * * * has the effect of making the representatives from the single districts more responsive to the special interests and characteristics of the individual district.

In contrast, under an at-large voting scheme in a community characterized by racial bloc-voting, the majority race, if cohesive, could deny the minority race any meaningful participation in the electoral process. In such cases, the votes cast by black voters, if they are in the minority, may be essentially wasted. That is not the situation here. Under the City's ward plan, black voters, although in the minority, will not cast futile votes; they will elect councilmen who can be anticipated to be concerned and active on behalf of their black constituents.

Moreover, and more importantly in the context of this case, the City's voting plan ensures black voters fair representation on the city council. Blacks constitute only 42 percent of the City's total post-annexation population, and only 37.3 percent of its voting-age population (App. 61; J.S. App. B, p. 26b). Under a perfect system of proportional representation, in an election conducted strictly along racial lines, black voters in the City could elect at most four (44.4 percent), and probably only three (33.3 percent), of the

nine members on the city council. Yet under the City's single-member district voting plan, candidates supported by black voters would be assured four council seats in such an election. Thus the City's voting plan ensures black voters that their representation on the city council will be as great or greater than their representation on the voting lists and the population at large.

B. The City's Change In Voting Practice Has Not Impaired The Effective Political Strength Of Its Black Residents

Although blacks constituted 52 percent of the City's total pre-annexation population, they comprised only 44.8 percent of its voting-age population (App. 61; J.S. App. B, pp. 23b-24b and n. 54). Under the City's at-large councilmanic election scheme, strict racial bloc-voting would have resulted in the election of an all-white slate to the city council.[9] In contrast, as a result of the annexation and the adoption of the single-member district voting plan, black voters are effectively guaranteed the power to elect at least four

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[9] In fact, three candidates—two white and one black (App. 175-176)—supported by appellee Crusade for Voters, a black civic organization, were elected in both 1968 and 1970 (see pp. 3-5, *supra*). One reason for this is that "'[w]hile in 1968 there were more whites than Negroes registered to vote, about 50% of the registered Negroes voted as against approximately 30% of the white registered voters'" (J.S. App. B, p. 10b). This suggests that many potential white voters apparently did not view control of the city council as a matter of concern or as a question of racial competition. But for analytical purposes, racial bloc-voting (stated by the district court to have been "evident" (J.S. App. B, p. 10b)) will here be assumed.

members to the council. Accordingly, the change in voting practice at issue here would, if anything, enhance, rather than decrease, the effective political strength of the City's black residents.

The district court, however, concluded that any such enhancement would be at best only temporary (J.S. App. B, pp. 23b-24b):

> The fact that the percentage of Richmond blacks of voting age is appreciably less than the percentage of blacks in the total population of course means that there are proportionally more black youngsters. We, like the white political leadership of Richmond, can anticipate that the present black population majority within Richmond's old boundaries will translate in a few years into a voting-age majority.[10]

We do not believe that, on the facts of this case, the City's change in voting practice should have been disapproved on the basis of such speculation about future demographic shifts in the City's population.

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[10] The district court further stated that "[i]n an at-large system such a [black] majority would ensure that none of the nine City Council seats was occupied by a candidate who appealed only to a white voting bloc, ignoring the needs and aspirations of Richmond's black citizens" (J.S. App. B, p. 24b). An apparent implication of this statement is that the district court would have disapproved the adoption of a single-member district voting plan even in the absence of an annexation, on the ground that such a plan would, by ensuring the election of some city councilmen who would represent predominantly white wards, hamper full effectuation of the political dominance of an emerging black majority. We do not believe that a single-member district voting scheme would deny or abridge black voting rights merely by ensuring a white voting minority fair representation in city government.

The City's demography and racial composition will of course change over time, and it may be expected that this change, at least within the City's pre-annexation boundaries, will be in the direction of a black voting-age majority. Yet it is not entirely obvious that the City's black voters would have had a more imminent opportunity to elect a majority of the city council under its pre-annexation at-large voting scheme than they do under the City's post-annexation ward plan. No demographic projections were introduced to show when, if ever, a 52 percent black population majority might be transformed into a black voting-age majority; certainly it is not inconceivable that net out-migrations of young blacks, or net in-migrations of older whites, could result in an indefinitely prolonged period during which whites retained majority voting power.

Similar uncertainties pertain to the City's post-annexation ward plan. Four of the wards have substantial, *i.e.*, more than 64 percent, black population majorities (App. 162). A fifth ward (Ward H) presently is 59.1 percent white and 40.9 percent black (*ibid.*). The black voting-age minority in that ward is 38.5 percent (J.S. App. B, p. 26b). Thus Ward H reflects almost precisely the racial composition of the post-annexation City as a whole (see p. 22, *supra*). But Ward H also is an area in transition. Almost completely white in 1950 (see App. 58, 161), Ward H has since that time experienced a substantial inflow of blacks (see App. 59, 60). This trend presumably will continue and may even accelerate. It is

therefore possible that Ward H could have a black voting-age majority even before such a majority is attained within the City's pre-annexation boundaries. All of this is of course merely speculation about an unknowable future. We advance it only to show that the district court's own demographic projection, although superficially persuasive, is not based upon irrefragable logic or even upon an informed weighing of probabilities.

We assume *arguendo* (and, indeed, this would be our own guess) that the annexation, even coupled with the adoption of a single-member district voting plan, probably will postpone the emergence of an effective black voting majority in the City's councilmanic elections. This consequence is, however, in our estimation, balanced by the immediate enhancement of black voting strength that has resulted from adoption of the ward plan. Thus we believe that the City's change in voting practice has caused no significant dilution in black voting rights. In these circumstances, we think it clear that that change does not have the effect of denying or abridging the right to vote on account of race.

In reaching this conclusion we are cognizant of the fact that, as appellee Crusade for Voters has shown (see J.S. App. B, pp. 29b-30b), the City could have devised a ward plan that would have significantly increased the likelihood that a "candidate supported by blacks * * * [would] be elected to the critical fifth seat on the City Council" (J.S. App. B, p.

30b).[11] The district court cited the existence of such an alternative plan as a basis for holding that the City's change in voting practice had the effect of denying or abridging the right to vote on account of race. We disagree. Application of the "effect" test under the Act to annexations does not require disproportionate maximization of black voting rights, at least where, as here, there has been no significant dilution of black voting strength.

II

THE CHANGE IN VOTING PRACTICE DOES NOT HAVE THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE

A. The City Need Not Adopt A Ward Plan That Disproportionately Maximizes Black Voting Rights In Order To Establish A Permissible Purpose For Retaining The Annexed Area

Purpose may in part be inferred from effect. The fact that a change in voting practice will not have the effect of denying or abridging the right to vote on account of race suggests that no such denial or abridgment was intended. But the Act imposes two tests, not one; a separate inquiry into purpose is necessary. Moreover, the inference from effect could in no event be dispositive here, for it is clear that the City's immediate purpose in concluding the annexation agreement was impermissible under the Act. See pp. 14-17, *supra*. The crux of this case concerns

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[11] Under the plan submitted by Crusade for Voters, the City's "swing ward" would be 59.0 percent black, whereas Ward H currently is 40.9 percent black (App. 162, 165).

the additional showing that the City must make in order to establish that it "no longer [has] * * * a discriminatory purpose in retaining the annexed area" (J.S. App. B, p. 19b).

The district court required the City to show that its "ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation" (J.S. App. B, p. 20b; footnote omitted). We are uncertain what that test, read in the abstract, would require. If it requires only a showing that effective black political power will not be significantly diluted, we believe that it has been satisfied here. See pp. 23-27, *supra*. But as we read the district court's opinion, the court's test requires the City to adopt a ward plan that would result, or be likely to result, in a black majority on the city council. Yet blacks constitute a minority of approximately 42 percent within the City's post-annexation boundaries and were not even a voting-age majority within the pre-annexation City (J.S. App. B, pp. 14b, 23b-24b). They are not entitled to the substantially disproportionate majority representation called for by the opinion below.

The district court's discussion of the "purpose" test reduces to a fundamental contradiction: the only ward plan that the court's opinion permits would itself have required deliberate, substantial racial gerrymandering in favor of blacks—a purpose and effect that would be of questionable validity under the Voting Rights Act. The court's holding places upon the City the burden of showing not only that the City's change in voting practice will not have the

effect of denying or abridging black voting rights but also that it will, in practice, disproportionately favor black votes, *i.e.*, that it will have the effect of denying or abridging white voting rights.

The error in the district court's analysis stems from a confusion of purpose with effect. The court required the City to show that the effect of its change in voting practice will be affirmatively and disproportionately favorable to blacks in order to establish that the purpose of the change was not discriminatory against blacks. That, we submit, was improper. In our view, in a case such as this a proper application of the "purpose" test would proceed as follows: (1) a state or political subdivision subject to the Act may carry its initial burden of coming forward with evidence of permissible purpose either by direct evidence of such a purpose or, in some instances, by establishing that its change in voting practice will have a permissible effect; (2) the burden is then shifted to the Attorney General or other party opposing the voting change to come forward with affirmative evidence of an impermissible purpose; (3) once such evidence is offered, the state or political subdivision then bears the burden of proving that it in fact has an objectively verifiable, legitimate purpose for the change. In short, the "purpose" test under the Act requires a showing of permissible purpose but not, as the district court apparently believed, of an over-compensatory effect.

B. The City Has Objectively Verifiable, Legitimate Reasons for Retaining The Annexed Area

The district court observed that "[t]he City apparently was moved in 1962 to file its annexation suit against Chesterfield County by legitimate goals of urban expansion" (J.S. App. B, p. 16l). The record supports that observation. For example, the City's Director of Planning and Community Development testified (App. 364, 365, 367-368):

> There were serious problems the city faced if annexation did not occur. The most physical, obvious, tangible reason for annexation is the urgent need for additional vacant land There is a serious shortage in the City of Richmond for vacant land. It is needed for housing. * * *
>
> Land was needed to allow expansion of commercial and industrial development. Land was needed if redevelopment and renewal were to in fact occur. * * *
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> * * * * *
>
> Another need for annexation was to reapture the spill over that had occurred across he corporate line. In fact, * * * the old corporate limits no longer included the real city. * * *
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> * * * * *
>
> Because someone moves to our communty and finds the home of his liking maybe two or three blocks beyond an annexation line of some previous annexation Court, to me that does not say at all that he has no responsibility for the welfare or the housing, the construction of public housing or the airport or the mair library or many of the other central city expenses that

> [should] in fact be borne by the total community. Conversely, there are problems in the county that I think city residents equally should share in finding the solution to. * * *

City Manager Alan F. Kiepper elaborated on the socio-economic reasons underlying the City's efforts to annex adjoining suburban communities (App. 369, 370-371, 373):

> I think there are three principal reasons why Richmond needed to expand its boundaries. The first of these dealt with the population imbalance * * *. The city was becoming a place of the very old and the very poor. It was losing its young affluent, what I called the leadership group. * * *
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> * * * * *
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> The second major factor * * * was the need for vacant developable land.
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> * * * * *
>
> The third reason * * * has to do with the increasing cost of government. This relates directly to the changing character of the population. We find expenditures for public health, public welfare, police, recreation, education, all have expanded and to a large extent these increases are directly related to the growth of low income population. * * *
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> * * * * *
>
> It is perfectly obvious that if the trends toward an increase in low income, dependent people, continues, and the more affluent continue to move out of the city, that the [increasing] costs of government in the city and the [diminishing]

> resources available in the city to pay these costs are going to result or could conceivably result in fiscal bankruptcy.

It is, moreover, clear that even as late as 1965 racial considerations as such played little or no role in the City's annexation plans, for in that year the City was offered, and rejected on purely fiscal grounds, an annexation of approximately 16 square miles of Henrico County with a virtually all-white population of 45,000. See p. 3, *supra*. On the other hand, the evidence is persuasive that racial considerations determined the terms and timing of the annexation agreement hastily concluded by the City after its 1968 councilmanic elections. See pp. 3-5, 16-17, *supra*. That agreement was entered into for the impermissible immediate purpose of using the City's at-large councilmanic election scheme to deprive black voters of any real voice in local government.

Since the annexation guarantees the continuance of a white voting-age majority in the City under any fair voting scheme, the mere conversion from at-large voting to a single-member district scheme that ensures fair representation does not, standing alone, establish that the City has any legitimate reasons, permissible under the Act, for retaining the annexed area. We therefore agree with the district court that in order to establish that the City "has purged itself of a discriminatory purpose in an annexation of new voters, it [must demonstrate] by substantial evidence * * * that [it] has some objectively verifiable, legitimate purpose for annexation" (J.S. App. B, p. 20b).

The district court held that the City had failed to make such a demonstration (J.S. App. B, pp. 20b-22b). In so holding, the court relied upon the special master's findings (J.S. App. C, pp. 11c-12c) that the annexation would prove fiscally burdensome to the City. We believe that those findings, which were based solely upon the interested testimony of the County Administrator of Chesterfield County (see J.S. App. C, p. 12c), were clearly erroneous. The evidence amply supports the City's contention that the cost of administering the newly annexed area will be significantly less than the revenues it will produce. See Appellant's Br. 53-59. Moreover, the district court gave insufficient weight to the substantial and legitimate reasons that underlay the City's long annexation quest. As the court of appeals observed in *Holt* v. *City of Richmond*, *supra*, 459 F. 2d at 1099:

> For perfectly valid reasons, Richmond's elected representatives had sought annexation since 1961. Those reasons were compelling, so much so that * * * annexation was "inevitable".

Perhaps the district court's greatest error was in ignoring the significance of the annexation to the City's school system, which is separate from the school systems in the adjoining counties. The City Manager testified that the annexation has enabled the City to maintain racially integrated schools (App. 386-387):

> I wanted to comment on the effect on the school system of de-annexation.

The ratio of white to black students in the Richmond public schools has been decreasing for many years. This current school year has seen a loss of some 4,000 white students. De-annexation will require immediate and major additional changes to the City's programs for school assignment, or it will preclude the maintenance of a reasonably integrated system.

Although exact data is not available at this time because spot maps have not yet been prepared, upon de-annexation it is the best estimate of the Superintendent of Schools that the school's enrollment or the average daily membership in the Richmond public schools would drop from approximately 45,000 to approximately 39,000, or a loss of some 6,000 students.

Virtually all of whom would be white. This would result in a school system with a ratio of 80 percent black and 20 percent white, and such a ratio would make it impossible to maintain any kind of reasonable semblance of a unitary school system within the remaining City.

And the court of appeals in *Bradley* v. *School Board of City of Richmond, Virginia*, 462 F. 2d 1058, 1064 and n. 6 (C.A. 4), affirmed by an equally divided court *sub nom. Richmond School Board* v. *Board of Education*, 412 U.S. 92, stated that the annexation "has resulted in adding to the school population of Richmond 10,240 pupils, of which approximately 9,867 are white" and that "[t]he district court's concern with viable racial mix has been partly alleviated by this annexation * * *."

We believe that the evidence in the record would support a finding that the City has objectively verifiable, legitimate reasons for retaining the annexed area. However, the parties at trial did not directly litigate that question. The parties, including the federal parties, concentrated on the extent to which the City's ward plan minimized the dilutive effects of the annexation, *i.e.*, on the permissibility of the effect of the voting change under *City of Petersburg*, and not on the nondiscriminatory purposes that might justify retention of the annexed area. Thus the City did not develop and present all its evidence relating to such purposes, and the intervening defendants have not had a full opportunity to rebut such evidence. Accordingly, we believe that it would be appropriate to vacate the judgment below and remand the case for the taking of additional evidence on the question whether the City now has a legitimate purpose in retaining the annexed area and for the making of new findings on that question under proper legal standards.

CONCLUSION

The City's change in voting practice will not have the effect of denying or abridging the right to vote on account of race. The question whether that change has the purpose of so denying or abridging the right to vote turns upon whether the City now has objectively verifiable, legitimate reasons for retaining the area it has annexed. The judgment below should be vacated and the case remanded to the dis-

trict court for the taking of additional evidence and the making of findings pertinent to that issue.

Respectfully submitted.

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